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IN THE

Supreme Court of the United States

October Term, 1959

No. 944

RUDY SALOMONS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI.

(Volume II)

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APPENDIX I.

Transcript of Clerk's Docket in Trial Court.

Pages 12-15 of Certified Record.

April 22, 1959.

Complaint filed sworn to by Byard S. Woodruff charging the Defendant with having on May 26, 1958, at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to-wit: VIOLATION SECTION 26286.5 HEALTH & SAFETY CODE COUNT I, VIOLATION SECTION 2141 BUSINESS & PROFESSIONS CODE COUNT II, VIOLATION SECTION 2141 BUSINESS & PROFESSIONS CODE COUNT III, VIOLATION SECTION 2141 BUSINESS & PROFESSIONS CODE, COUNT IV, VIOLATION SECTION 26286.5 HEALTH & SAFETY CODE COUNT V, VIOLATION SECTION 2141 BUSINESS & PROFESSIONS CODE COUNT VI, VIOLATION SECTION 2141 BUSINESS & PROFESSIONS CODE COUNT VII.

April 22, 1959.

Warrant issued. Bail set at $1000.00.

May 4, 1959.

$1000.00 surety bond approved and filed. (U. S. Fidelity and Guaranty Company).

May 5, 1959.

Cause called. Judge Delbert Wong presiding. Both parties ready. People represented by J. L. Denny, (D.C.A.) Defendant represented by Paul Freeman.

Defendant in court, duly arraigned, informed of the charges against him and of his legal rights. Defendant gives true name as charged and enteres his plea of not guilty of the offense charged.

Defendant with counsel in open court each personally demands jury trial.

Trial set for June 4, 1959, at 9 A. M. in Division 20.

Bail up to stand.

May 14, 1959.

Affidavit for subpoena duces tecum, filed. Subpoena duces tecum issued.

June 1, 1959.

In the following case Erwin Goodman Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge David W. Williams presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant represented by R. Benson.

Defendant in court, and leave of court first obtained withdraws plea of not guilty heretofore entered and now enters plea of guilty of the offense charged as to Count IV. Counts I, II and III dismissed. Waives time.

Defendant makes oral application for probation, continued to June 22, 1959, at 1:30 P. M. for hearing on probation and sentence in Division 20.

Bail up to stand.

June 22, 1959.

In the following case A. Figueroa Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge David W. Williams presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant in court and represented by Ralph Benson.

Probation report filed. Probation granted.

Proceedings suspended without imposition of sentence and defendant placed in custody of Probation Officer for a period of two years subject to the following terms of probation;

1. Serve first 30 days in City Jail.
2. Pay a fine of $500.00.
3. Possess no medicine or similar equipment which bears the word "caution" nor dispense without a prescription.
4. Place no advertisements in newspapers which may be construed as misleading.
5. Maintain residence as approved by Probation Officer.
6. Maintain employment as approved by Probation Officer.
7. No further violations of law.

Stay on commitment until July 6, 1959, at 1:30 P. M. in Division 20.

Fine $500.00 paid Rec. 18536.

Bail ordered exonerated.

June 30, 1959.

In the following case M. Racklin Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge David W. Williams presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant in court and represented by B. Marks.

Cause continued to July 13, 1959, at 1:30 P. M. on motion of Defendant.

July 13, 1959.

In the following case Lester Zive, Reporter is ordered to take down proceedings as provided by law. Division 20 convened at 1:30 P. M.

Cause called. Judge David W. Williams presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant in court and represented by Burton Marks; J. B. Nisbet, Deputy Clerk.

Defendant's motion to vacate plea of guilty and enter plea of not guilty—denied.

Notice of Appeal from order denying motion, filed.

Proposed Statement on Appeal, filed.

Bail set on appeal in the sum of $1000.00.

$1000.00 cash bail posted. Rec 37005-U.

Execution of sentence stayed.

Appeal bail up to stand.

July 14, 1959.

Affidavit of service of the Notice of Appeal and Proposed Statement on Appeal, filed.

July 23, 1959.

Division 20. Judge David W. Williams presiding. People represented by Jack D. Scott, (D.C.A.) Defendant not in Court and not represented.

Entry of June 1, 1959 ordered corrected nunc pro tunc, to read as follows:

Defendant in court, and leave of court first obtained withdraws plea of not guilty heretofore entered and now enters plea of guilty of the offense charged in Count 4.

Counts 1, 2, 3, 5, 6 and 7 dismissed.

July 24, 1959.

Hearing to settle Statement on Appeal is set for July 31, 1959 at 2:00 P. M. in Division 20.

Notices mailed. Affidavits of service by mail sworn and filed.

July 31, 1959.

In this case Lester Zive, Reporter is ordered to take down proceedings as provided by law. Division 20 convened at 1:30 P. M.

Cause called. Judge David W. Williams presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant not in court but represented by Burton Marks; J. B. Nisbet, Deputy Clerk.

Statement on Appeal settled, allowed, certified and signed.

APPENDIX II.

Affidavits in Support of This Petitioner's Motion in the Trial Court to Set Aside the Judgment and Plea of Guilty.

Pages 18-24 inclusive of Certified Record.

AFFIDAVIT OF RUDY SALOMONS IN SUPPORT OF MOTION TO SET ASIDE JUDGMENT AND PLEA OF GUILTY AND/OR MOTION FOR MODIFICATION.

State of California, County of Los Angeles—ss.

RUDY SALOMONS deposes and says:

That he is over the age of eighteen years and if called and sworn could competently testify to the facts as hereinafter set forth.

That your affiant is a licensed doctor of chiropracty and has been so licensed by the State of California Department of Professional and Vocational Standards since November 12, 1948; that he is the defendant in the within case.

That on or about the 4th day of May, 1959, your affiant was arrested at his office by State Officers assigned to the Board of Medical Examiners and was thereafter arraigned on several counts of alleged violation of the Business and Professional Code (a photostatic, certified copy of the Complaint filed against your affiant is attached hereto and marked Exhibit "A" and made a part of this Affidavit by reference); that thereafter your affiant pleaded "not guilty" to each and every count therein.

That on May 5, 1959, after your affiant had been arraigned on the said charge, your affiant in the presence of VICTOR L. HITE, (D.C.) was visited at his office by ROBERT O. MERRITT, a special investigator for the Board

of Medical Examiners, a department of the State of California.

That at said time and place MR. MERRITT and your affiant and DR. HITE had a conversation with respect to the offenses which your affiant had allegedly committed. At that time MR. MERRITT informed your affiant in the presence of DR. HITE that in this type of case the ordinary situation was to plead "guilty" to one count of the Complaint and pay the fine and there would be nothing more done about the case. To your affiant's best recollection, MR. MERRITT's exact words were, "Why fight it? You won't be in any jeopardy. We don't bother you after this comes to Court. You just pay your fine and forget it."

That thereafter, between May 4 and June 1, 1959, your affiant retained an attorney, MR. RALPH BENSON, for his defense. That MR. HOWARD KAPLAN, attorney at law, an associate of MR. BENSON, informed your affiant that he had gone and talked to the Board of the Medical Examiners and was told by the said Board that if a guilty plea to one of the counts was entered no jail sentence would be given to your affiant.

That thereafter, on June 1, 1959, (the date set for trial of your affiant), your affiant's attorney, MR. KAPLAN, went into the Judge's chambers with the City Attorney. MR. KAPLAN then emerged from the Judge's chambers and informe your affiant that if he would plead guilty to count IV of the Complaint that the Court would dismiss all other counts. MR. KAPLAN informed your affiant that the Judge would require a Probation Report before he would sentence your affiant.

At the time of this conversation with MR. KAPLAN your affiant was seated next to MR. BYARD S. WOODRUFF, Senior Special Investigator for the Board of Medi-

cal Examiners. MR. WOODRUFF heard the discussion between your affiant and his attorney and after hearing that a Probation Report was required he informed your affiant as follows: "Don't worry, Rudy, I assure you there is not going to be a jail sentence. You go up there and plead "guilty" to count IV and you'll get straight probation and a stiff fine. Why I even know of a case where the Probation Officer did not recommend probation, and the Judge granted it nevertheless."

That furthermore, although your affiant had never seen the actual Complaint in this matter, at the time of his entering his plea of guilty he had been informed by his counsel and by the aforesaid members of the State Board of Medical Examiners that the offense involved in count IV involved the matter of dispensing vitamin tablets in the month of January 1959, without being a licensed Doctor of Osteopathy or M. D.; that at the time your affiant entered his plea of guilty to the said count IV, your affiant was fully aware of the opinion from the State Board of Chiropractic Examiners, dated January 13, 1957, wherein said opinion stated that the dispensing of vitamins, enzymes, minerals, dietary supplements and foods were a proper part of chiropractic practices. That notwithstanding your affiant's knowledge and feeling that he had complied only with the opinion of the Board of Chiropractic Examiners, he nevertheless was induced and persuaded to plead guilty to said count IV of the Complaint upon the representations of the representatives of the State Board of Medical Examiners that there would be nothing more serious than a fine and probation. That your affiant is a very busy practitioner and rather than spend the time and expense involved in a protracted trial, your affiant felt it would be better to get the whole thing over with as promised to him. That if your affiant

had known or had any reason to know that he would have been sentenced to jail for an offense which was not a crime, he would have demanded a jury trial and have his guilt or innocence determined in accordance with his Constitutional rights. (A copy of the transcripts of the proceedings had at the time of your affiant's entering his plea of "guilty" to count IV of the Complaint is appended hereto and marked Exhibit "B" and made a part of this Affidavit by reference.)

That after entering a plea of guilty to the said offense your affiant had occasion to speak with the Probation Officer and at the time of talking with the Probation Officer was assured by the Probation Officer that probation would be granted to your affiant in accordance with the representations made to your affiant by the representatives of the State Board of Medical Examiners and their investigating officers. (A copy of the Probation Report is appended hereto and marked Exhibit "C" and made a part of this affidavit by reference.)

That since your affiant has been sentenced your affiant has had occasion to read a copy of the Probation Officer's Report wherein the Probation Officer describes the alleged events of January 1959, wherein your affiant is allegedly supposed to have practiced medicine without a license. That the events therein described (as related by the arresting officer) describe nothing more than the use of physical therapy and/or physiotherapy—including galvanic and sinusoidal currents, and shortwave diathermy, all of which is approved as part of the normal practice of a chiropractor according to the aforementioned opinion of January 13, 1957, from the Board of Chiropractic Examiners. The opinion of January 13, 1957, is appended to the Probation Report.

That thereafter, on June 22, 1959, your affiant appeared before the HONORABLE DAVID WILLIAMS in Division 20 of the above entitled Court. (A transcript of the proceedings had therein is appended hereto and marked Exhibit "D" and made a part of this affidavit by reference.)

That at said time and place the Court pronounced sentence against your affiant, a portion of which sentence was that your affiant be placed on two years' probation; pay a fine in the sum of $500.00, and serve the first thirty days in jail. One further condition of probation was that your affiant not publish or cause to be published any advertising which "might be construed as misleading."

That under the rules and regulations of the State Board of Chiropractic Examiners it is permissible for chiropractors to advertise their trade in a dignified and professional manner. That your affiant does not know what kind of advertising "might be construed as misleading"; does not know who might so construe it; and therefore does not have any way of knowing any advertising he might do would be a violation of his terms of probation. Your affiant respectfully submits that this condition of probation is a prior restraint on his right to free speech as guaranteed by the United States and California Constitutions.

That your affiant notes in the Probation Report that he is accused of having a prior violation of a similar nature charged against him. That your affiant respectfully states that the "prior violation" was a violation involving the failure of your affiant to use the initials "D.C." after his name. That the only place at the time of the alleged prior violation where the initials "D.C." did not appear

were on the appointment cards of your affiant. That because your affiant was technically guilty of the said offense through an oversight, your affiant pleaded guilty as charged.

That your affiant once again reiterates that if it were not for the assurances, representations and promises of officers of this State that your affiant would not receive a jail sentence your affiant would not have pleaded guilty to the offense as charged or any of the offenses as charged since your affiant does not believe himself to be guilty as aforesaid. That your affiant well and truly believes that the sentence as imposed by this Court is harsh, cruel and unusual in light of the facts brought before this Court; that your affiant is a man of good moral character and has never been charged with any other offenses than as stated herein and his good moral character has been attested to by the letters of reference appended to the Probation Report. That your affiant well and truly believes that the representations made by the State Board of Medical Examiners were false, fraudulent and well calculated to overreach the free will of your affiant and each and every representation as made by said State Officers was made knowing the statements to be false.

WHEREFORE, your affiant respectfully requests this Honorable Court grant your affiant's Motion to set aside his plea of guilty and to vacate the judgment and/or in the alternative to modify your affiant's sentence to eliminate the jail time imposed.

I certify under penalty of perjury the aforegoing statements to be true and correct.

Dated: July 6, 1959.

RUDY SALOMONS
Rudy Salomons

AFFIDAVIT OF VICTOR L. HITE IN SUPPORT OF MOTION TO SET ASIDE JUDGMENT AND PLEA OF GUILTY AND/OR MOTION FOR MODIFICATION.

State of California, County of Los Angeles—ss.

VICTOR L. HITE deposes and says:

That he is over the age of eighteen and if called and sworn could competently testify to the facts as hereinafter set forth.

That your affiant has read that portion of the Affidavit of Rudy Salomons wherein he states that a conversation between RUDY SALOMONS and an investigator, MR. MERRITT, held at the office of DR. SALOMONS and your affiant, at 3156 Wilshire Boulevard, on or about May 5, 1959, took place.

That your affiant was present at all times during the conversation between MR. MERRITT and DR. SALOMONS and affirms that MR. MERRITT did in fact tell DR. SALOMONS that if he (DR. SALOMONS) were to plead guilty of one count all of the rest of the counts would be dismissed and that there would be no further trouble and that all that DR. SALOMONS would get out of it would be a fine and possibly probation; that if he (DR. SALOMONS) would plead guilty to the one count as suggested that he, MERRITT, could assure him that nothing more would happen.

That thereafter and prior to June 1, 1959, your affiant had occasion to talk to DR. SALOMONS in private wherein DR. SALOMONS informed your affiant that if he, DR. SALOMONS, could be assured of a fine and probation and get the matter over with he would plead guilty to a count as MR. MERRITT had suggested; that if he could not get such assurance he might as well fight the matter

since it was perfectly evident that he was not guilty of any crime.

I certify under penalty of perjury the aforegoing statements to be true and correct.

Dated: July 6, 1959.

VICTOR L. HITE
Victor L. Hite

APPENDIX III.

Memorandum Opinion of the Appellate Department of the Superior Court, County of Los Angeles State of California.

Pages 65-67 inclusive of Certified Record.

This opinion is unreported.

Appeal by defendant from order and "judgment" of the Municipal Court of the Los Angeles Judicial District, David W. Williams, Judge. Order affirmed; appeal from judgment dismissed. For Appellant—Umann and Marks. For Respondent—Roger Arnebergh, City Attorney; Philip E. Grey, Assistant City Attorney; William E. Doran, Deputy City Attorney.

The purported appeal from the judgment must be dismissed because sentence was not pronounced and, therefore, there is no judgment. We have grave doubts as to whether the order denying defendant's motion to set aside judgment and plea of guilty is appealable. It is well established that such an order is not appealable but is reviewable on appeal from the judgment. People v. Moffett (1955), 137 Cal. App. 2d 626. The only theory upon which this order could be appealable is that an order granting probation is, in some ways, comparable to a judgment and this order was made after probation was granted. Such an order would be appealable if made after judgment. Penal Code 1237 which governs appeals from the Superior Court states: "an order granting probation shall be deemed to be a final judgment within the meaning of this section." Penal Code 1466 re appeals to the Superior Court makes orders granting probation appealable but does not state that such an order is deemed a final judgment. We need not spend any more time on

this point. If the order is not appealable, the appeal therefrom should be dismissed, if it is appealable that order should be affirmed. The end result is the same in either case. We affirm the order in question on the authority of such cases as Smith v. Smith (1958), 157 Cal. App. 2d 658, which states at p. 662: "It is clear from the court's discussion, previously referred to, that the court did not give full credence to the affidavits of plaintiff, her daughter and her attorney. This the court was privileged to do although the affidavits were not contradicted by opposing affidavits in view of the interest of the affiants in the outcome of the case." See also People v. Bannister (1957), 153 Cal. App. 2d 480, 484.

The order denying defendant's motion to set aside judgment and plea of guilty and to modify probation is affirmed. The appeal from the judgment is dismissed.

Dated January 29, 1960.

SWAIN
Presiding Judge

We concur:

HULS
Judge

SMITH
Judge

APPENDIX IV.

Judgment.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the order denying defendant's moiton to set aside judgment and plea of guilty and to modify probation made and entered in the Municipal Cort of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed. The appeal from the judgment is dismissed.

APPENDIX V.

Pertinent Excerpts From This Petitioner's Motion in the Trial Court and His Opening Brief in the Appellate Court.

Pages 28-29; 74-75 of the Certified Record.

The excerpt from each pleading is identical with the other.

"The Fourteenth Amendment of the United States Constitution enjoins a state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States; and from depriving any person of life, liberty or property without due process of law. The same injunction appears in Article One, Section Thirteen, of the California Constitution.

To compel a plea of guilty by threat, fraud or coercion is denial of due process, and, in a proper case, if found to exist, would warrant issuance of Writ of Error coram nobis.

People v. Chapman, 106 Cal. App. 2d 51."